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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1963

CHARLES W. EATON AND SARAH L. EATON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 454

CHARLES W. EATON AND SAMMY L. EATON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1968. A petition for rehearing was denied on July 31, 1968. On August 29, 1968, the petition for a writ of certiorari was filed. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the convictions should have been reversed because of the conduct of government counsel to which no exception was taken at the trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioners were convicted of violating the alcoholic tax laws and conspiring to do so (26 U.S.C. 5604(a)(1); 18 U.S.C. 371).[1] On May 6, 1966, petitioner Charles W. Eaton was sentenced to fifteen months' imprisonment on the conspiracy count, and fined $1,000 on the substantive count. Sammy L. Eaton was sentenced on three counts to concurrent terms of three years' imprisonment.

The evidence showed that United States Treasury agents in Prentiss County, Mississippi hired M. C. McCarver as a "special employee" (R. 42). Pursuant to his employment, McCarver, accompanied by a neighbor, Pettygo, went to the vicinity of Charles Eaton's home. Upon meeting Charles Eaton, McCarver gave him the name of Marvin Turner, "a whiskey man," as reference, and Eaton then agreed to sell McCarver fifty gallons of whiskey at $6 per gallon (R. 53-55). In the early morning hours of

[1] The two substantive counts involved transactions of April 22 and May 1, 1965. Charles Eaton was acquitted of the count involving the May 1 delivery (count 3).

April 23, 1965, Charles Eaton signalled McCarver at the latter's home and then brought him to a vehicle driven by his nephew (R. 47), petitioner Sammy Eaton (R. 56, 66). Shortly thereafter federal agents saw Sammy deliver non-tax-paid whiskey at the McCarver home and receive payment for it (R. 43-44, 72-73).

A week later McCarver went back to the area of Charles Eaton's residence. He spoke with Sammy and arranged for fifty gallons of whiskey to be delivered that night (R. 59). On May 1, 1965, Sammy made delivery. Federal agents again witnessed the transfer of money and noted the lack of tax stamps on the whiskey containers (R. 46-48, 78).

The defense called Pettygo as a witness. He denied introducing McCarver to petitioner Charles Eaton (R. 96). Cross-examination, without objection, elicited the information that Pettygo knew McCarver had been buying moonshine and knew that McCarver was trying to find Charles Eaton in an effort to buy whiskey from him (R. 99-100, 105).

Petitioner Charles Eaton testified that he had met with McCarver only once and that he had refused to sell him fifty gallons of whiskey (R. 114-115). He stated that he had previously been convicted of a federal liquor violation (R. 118) but that he had had nothing to do with untaxed whiskey for many years. He knew nothing of his nephew's dealings with McCarver (R. 116-118). On cross-examination, without objection, he was asked whether it was not a fact that he had a local reputation of being a moonshine dealer. He denied this and stated that he did "mess with

bonded whiskey" for which he had a "stamp" (R. 127). He denied meeting McCarver when a Joe Carnathan was present and denied any moonshine liquor dealings with a man named White (R. 125-127). He also denied using his nephew as a "front" (R. 128).

ARGUMENT

Although no objection was taken at trial, petitioners argue that the cross-examination of Charles Eaton and the reference to him in final argument require reversal. The court of appeals properly held there was no error requiring reversal.

Counsel for petitioners make no effort to dispute the guilt of petitioner Sammy L. Eaton. At trial, counsel said that he had no defense for the nephew (R. 185). Thus the argument essentially relates only to Charles Eaton.

Petitioner's claim of plain error must be evaluated in the context of the trial, in which Pettygo, although reluctant to aid the prosecution, did corroborate McCarver's account of making the trip to find petitioner Charles Eaton in an effort to buy whiskey from him (R. 101, 105). The delivery of fifty gallons of whiskey at McCarver's home by the nephew some few hours later tended to confirm McCarver's version of the meeting.

Since, however, no witness other than the two involved testified to the McCarver-Charles Eaton conversation which culminated in the April 24 sale, the prosecutor properly subjected Eaton to vigorous cross-examination. When petitioner Charles Eaton claimed on direct examination that he had not had dealings

in untaxed whiskey for many years, he opened the door to cross-examination concerning his occupations and associates. See *Alford* v. *United States*, 282 U.S. 687; cf. *United States* v. *Kelly*, 349 F.2d 720, 775 (C.A. 2), certiorari denied, 384 U.S. 947. Even if the one question of petitioner Charles Eaton as to his own reputation was improper, it did not add substantially to the case. Pettygo, a defense witness, had testified that he had gone with McCarver to a "bootleg joint" looking for Charles Eaton (R. 105). An isolated instance of questionable zeal cannot be equated with egregious, repetitive acts of misconduct which require reversal. *United States* v. *Robbins*, 340 F.2d 684, 689 (C.A. 2); cf. *Berger* v. *United States*, 295 U.S. 78, 89.

The argument of the prosecutor, as reprinted in the petition (Pet. 15), is too abbreviated. Speaking of the informer, McCarver, petitioners quote a portion of the argument ending with the phrase "I think it is most credible" (R. 193). The argument immediately continued as follows (R. 193-194):

> "Now, the Judge tells you, just like I will also tell you, that you should receive his testimony with caution * * * If you think [the witnesses] * * * have told a falsehood on any point, you can discount that testimony. If you want to disbelieve them completely, of course you can * * *."

Moreover, defense counsel repeatedly told the jury what weight they would personally attach to the testimony of petitioner Charles Eaton (R. 176, 177, 179, 186).

This record does not reflect exceptional circumstances warranting deviation from the rule that this Court will not review arguments to the jury where defense counsel remains silent, interposes no objections, and waits until after the verdict to allege impropriety. *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150, 238-239.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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